4

Supreme Court U S
FILED
APR 18 2006
OFFICE OF THE CLERK

No. 05-7053

IN THE

Supreme Court of the United States

KESHIA CHERIE ASHFORD DIXON,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

JEFFREY T. GREEN
KATRICE L. BRIDGES
CYTHERIA D. JERNIGAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

J. CRAIG JETT*
1601 Elm Street
Suite 2000
Dallas, Texas 75201
(214) 871-7676

Counsel for Petitioner

* Counsel of Record

April 18, 2006

WILSON EPES PRINTING CO., INC - (202) 789 0096 - WASHINGTON, D C 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. RESPONDENT'S "SUBSTANTIAL PRACTICAL CONSIDERATIONS" DO NOT SUPPORT IT'S POSITION	1
II. THE COMMON LAW SUPPORTS PLACING THE BURDEN OF PERSUASION ON THE PROSECUTION	11
III. DUE PROCESS CONCERNS REQUIRE THE BURDEN OF PERSUASION TO BE PLACED ON THE PROSECUTION	15
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

	Page
Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	17, 18
Associated Gen. Contractors of Cal., Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983)	12
Brecht v. *Abrahamson*, 507 U.S. 619 (1993)	14
Coffin v. *United States*, 156 U.S. 432 (1895)	13
Cooper v. *Oklahoma*, 517 U.S. 348 (1996)	2
Davis v. *United States*, 160 U.S. 469 (1895)	12, 13
Estelle v. *Williams*, 425 U.S. 501 (1976)	3
Funk v. *United States*, 290 U.S. 371 (1933)	12
Jackson v. *Denno*, 378 U.S. 368 (1964)	7
Jacobson v. *United States*, 503 U.S. 540 (1992)	5
Leland v. *Oregon*, 343 U.S. 790 (1952)	7
Liparota v. *United States*, 471 U.S. 419 (1985)	15, 16
Martin v. *Ohio*, 480 U.S. 228 (1987)	7, 16
Martin v. *United States*, 606 A.2d 120 (D.C. 1991)	17
Mathews v. *United States*, 485 U.S. 58 (1988)	11
McKelvey v. *United States*, 260 U.S. 353 (1922)	14
Morissette v. *United States*, 342 U.S. 246 (1952)	15
Morrison v. *California*, 291 U.S. 82 (1934)	2
Patterson v. *New York*, 432 U.S. 197 (1977)	2, 16
Powell v. *Texas*, 392 U.S. 514 (1968)	16
Puerto Rico Dep't of Consumer Affairs v. *Isla Petro. Corp.*, 485 U.S. 495 (1988)	14
Sorrells v. *United States*, 287 U.S. 435 (1932)	11
Staples v. *United States*, 511 U.S. 600 (1994)	15, 16
Tot v. *United States*, 319 U.S. 463 (1943)	1
United States v. *Alvarez*, 755 F.2d 830 (11th Cir. 1985)	5, 9
United States v. *Bailey*, 444 U.S. 394 (1980)	3

TABLE OF AUTHORITIES - CONTINUED

Page

United States v. *Branch*, 91 F.3d 699(5th Cir. 1996) 9, 10

United States v. *Clavette*, 135 F.3d 1308 (9th Cir. 1998) 9

United States v. *Corrigan*, 548 F.2d 879 (10th Cir. 1977) 9

United States v. *Franklin*, 704 F.2d 1183 (10th Cir. 1983) 17, 18

United States v. *Frazier*, 387 F.3d 1244 (11th Cir. 2004) *cert denied* 125 S. Ct. 2516 (2005)..... 6

United States v. *Hernandez-Franco*, 189 F.3d 1151 (9th Cir. 1999)..... 10

United States v. *Huckaby*, 698 F.2d 915 (8th Cir. 1982) 17

United States v. *Jones*, 587 F.2d 802 (5th Cir. 1979) 17

United States v. *Mitchell*, 725 F.2d 832 (2d Cir. 1983) 7

United States v. *Santos*, 932 F.2d 244 (3rd Cir. 1991) 10

United States v. *Scheffer*, 523 U.S. 303 (1998)..... 3

United States v. *Scott*, 901 F.2d 871 (10th Cir. 1990) 10

United States v. *Talbott*, 78 F.3d 1183 (7th Cir. 1996) 6, 9

United States v. *Toney*, 27 F.3d 1245 (7th Cir. 1994) 10

United States v. *Turner*, 441 F.2d 1161 (4th Cir. 1971) 18

United States v. *Wagner*, 834 F.2d 1474 (9th Cir. 1987) 9

In re Winship, 397 U.S. 358 (1970) 15

TABLE OF AUTHORITIES - CONTINUED

Page

STATUTES

Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. IV, 98 stat. 2057 codified at 18 U.S.C. § 17(b) 12
Fed. R. Crim. P. 12.2(b) 5
Fed. R. Crim. P. 16 4
USSG §5k.1 4
D.C.D.C. LCvR 16.5(b)(5) 4, 5

SCHOLARLY AUTHORITY

G. Binder, *The Rhetoric of Motive and Intent*, 6 Buff. Crim. L.R. 1, 66 (2002) 17
G. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880 (1968) 13
E. J. Grannis, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Colum. L. Rev. 178, 189-90 17
C. McCormick, *Handbook of the Law of Evidence*, §321 (1964) 11
L. Newman & L. Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. Cal. L. Rev. 313 (1957) 8, 15
LaFave & Scott, *Substantive Criminal Law*, § 5.7 (1986) 9
O'Malley, Grenig, & Lee, *Federal Jury Practice and Instructions, Criminal*, § 45.19 (2004) 9, 10
O'Malley, Grenig, & Lee, 1A *Federal Jury Practice and Instructions, Criminal* § 17.06 (5th ed.) 17
2 P. Robinson, *Criminal Law Defenses* (1984) 9, 15

TABLE OF AUTHORITIES - CONTINUED

Page

22 Wright & Graham, *Federal Practice & Procedure Evidence* § 5240 (1978) 17

OTHER AUTHORITIES

Model Penal Code § 1.12 (1962)..... 9, 11

Blacks Law Dictionary (6th ed. 1990) 18

§1.36 *Fifth Circuit Jury Instructions, Criminal* (2001)..... 10

ARGUMENT

Respondent's brief succeeds only in setting forth "arguments from convenience" in favor of imposing a burden of *production* on defendants who assert a duress defense. Respondent's further reliance upon those arguments to permit judge-made burden shifts, so that similarly situated defendants in some federal circuits will bear burdens that those in other circuits do not, collapses in the face of competing practical considerations, long-established and carefully reasoned common law, and constitutional concerns about the erosion of the reasonable doubt standard.

I. RESPONDENT'S "SUBSTANTIAL PRACTICAL CONSIDERATIONS" DO NOT SUPPORT ITS POSITION

Respondent first maintains that "the defendant will usually be in a far better position than the government to adduce evidence on a purported duress defense." Resp. Br. 20. By its own terms, this assertion justifies no more than requiring defendants who claim duress to adduce evidence of it. The Court has previously rejected that rationale. "In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much." *Tot* v. *United States*, 319 U.S. 463, 469 (1943).[1] Nor do Respondent's cited authorities support its position.

---

[1] Respondent asserts that *Tot* is not applicable because it involved a statutory presumption of an element of the offense and not a burden shift. Resp. Br. 25 n.17. But the presumption addressed in the case - that the possession of a firearm was presumptive evidence that the firearm had been shipped, transported or received by the possessor - effectively shifted the burden of proof to the defendant.

In *Patterson* v. *New York*, 432 U.S. 197, 211 n.13 (1977), the Court addressed only a mitigating circumstance which would lessen the punishment for the offense. Duress, however, is a complete defense to a crime. If a defendant successfully asserts a duress defense, she is found not guilty of the crime. Similarly, *Cooper* v. *Oklahoma*, 517 U.S. 348, 366 (1996), did not involve the allocation of burdens attendant to the trial itself, but to the determination of competency to stand trial.[2] And in *Morrison* v. *California*, 291 U.S. 82, 91 (1934), the Court held that due process was violated when the state placed the burden of proving citizenship on a defendant charged with conspiring to violate the Alien Land Law. While the Court did state that the burden of proof could be shifted upon employing a balancing test and finding that shifting the burden will be "an aid to the accuser without subjecting the accused to hardship or oppression," it failed to find that test had been satisfied in that case. *Id.* at 89. If the difficulty in proving citizenship does not fit into the limited circumstances where the government can shift the burden based on convenience of proof, then certainly duress does not qualify either.

Respondent further argues that the "sole evidence of duress will be testimony offered by the defendant and close associates who have an incentive to protect the defendant." Resp. Br. 20. Yet there is absolutely nothing unique about the duress defense in this regard. The argument says little more

---

[2] In *Cooper*, Oklahoma had placed the burden to prove competency on the defendant by clear and convincing evidence, while the majority of jurisdictions required the defendant to meet a preponderance of the evidence standard. The Court struck down this requirement, finding that the prosecution's interest in "prompt and orderly disposition of criminal cases" did not support imposing a higher burden of proof on the defendant. *Cooper*, 517 U.S. at 360. That Court did not in any way address Respondent's claim that "[t]he difficulty of ascertaining where the truth lies" would make it appropriate to place the burden of proof on the proponent of an issue. Resp. Br. 24 (*quoting Cooper*, 517 U.S. at 366).

than the prosecution should not bear the burden of proof because defense witnesses will lie to protect the defendant. Moreover, the premise is wholly contrary to the presumption of innocence, see *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976) (assumption that the defendant has more knowledge of the facts than the government presumes that the defendant is guilty, contrary to the presumption of innocence), and promotes a highly cynical view of the jury's capacities. *United States* v. *Scheffer*, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that the jury is the lie detector.") (internal quotations and citations omitted).

Second, Respondent contends, without authority, that "in most cases" prosecutors will not have access to the individual responsible for the coercion. Resp. Br. 21. That was not true in this case and, given the prosecution's resources, that is not necessarily true in other cases. Even if it were true, this "practical consideration" – and, all of Respondent's practical considerations - entirely ignores the District Court's function as a gatekeeper who can exclude evidence or refuse a jury instruction on a defense where the evidence is insufficient and uncorroborated. As the Court cautioned in *Bailey*, if "an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense." *United States v. Bailey*, 444 U.S. 394, 416 (1980).[3]

---

[3] Respondent's note that the Court's opinion in *Bailey* "has language pointing toward placing the burden on the defendant." Resp. Br. 31 n.22 points only to language that would support placing the burden of *production* on defendants claiming duress. The holding of *Bailey* was just that: "such evidence and testimony were lacking, and hence respondents were not entitled to any instruction on duress or necessity." *Bailey*, 444 U.S. at 395. The relevance of *Bailey* to this case is that the Court there highlighted the power of the District Courts to exclude evidence of specious claims of duress.

The absence of authority to support Respondents' claim of a general lack of access to the alleged abuser is also telling. Most criminal cases in the federal courts involve multiple defendants. Prosecutors have extensive powers beyond granting immunity to make charging decisions, to reach plea agreements and offer downward departures for substantial assistance pursuant to the Sentencing Guidelines (see USSG § 5K.1), in order to gain access to a witness who is close to the defendant and the facts of the case, and who will provide testimony on behalf of the prosecution. While Respondent decries the prospect of granting immunity to one with equal or greater culpability for the charged crime (see Resp. Br. 21 n.14), the fact of the matter is that immunity is relatively rare, whereas the use of charging discretion, plea agreements and § 5K.1 departures are the "bread and butter" of federal criminal prosecutions. Respondent's speculation about a lack of access in "most cases" therefore has little merit.

Respondent further complains that the defendant should have the burden of proof on a duress defense because he or she "is generally under no obligation to notify the government before trial that the defense will be raised." Resp. Br. 22. Yet a duress case is no different than any other case where the defendant simply pleads not guilty to the indictment or raises a defense. A defendant has no obligation to give the prosecution notice of the defense of self-defense, entrapment or other statutory defenses. Just as the prosecution is under no duty to inform a defendant of all of its evidence prior to trial, the accused is under no duty to provide notice of its duress defense.

In any event, all criminal defendants must satisfy the reciprocal discovery obligations of Fed. R. Crim. P. 16. Most federal courts will require both the prosecution and the defense to provide a list of witnesses prior to trial and designate whether the witness will provide factual or expert testimony. E.g., D.C.D.C. LCvR 16.5(b)(5). Many courts will require the defendant to give a brief statement of the

subject matter of the expert's testimony, if for some reason pretrial notice was not otherwise provided. *Id.* Further, a defendant who claims duress must provide notice of her intention to introduce expert testimony relating to a mental disease, defect or other mental condition. Fed. R. Crim. P. 12.2(b). In that case, as here, the court may order the defendant to submit to an examination by an expert hired by the government, which is precisely what happened in this case. In the situation where the prosecution really has no indication that duress will be raised, the prosecution retains the power to call rebuttal witnesses to refute the duress defense. Thus, there are already safeguards in place to protect against the lack of notice.

Third, Respondent argues that "requiring the defendant to establish the defense of duress helps protect against spurious claims of duress." Resp. Br. 23. The same could be said of the defense of self-defense or entrapment, about which there is no question where the burden of proof lies. *Jacobson* v. *United States*, 503 U.S. 540 (1992); *United States* v. *Alvarez*, 755 F.2d 830, 842 (11th Cir. 1985) (it has become "a well-established proposition of federal criminal law that, when a defendant presents evidence in support of a claim of self-defense, the absence of self-defense must be proven beyond a reasonable doubt by the government"). There is simply no more potential for the abuse of the duress defense than there is for the abuse of self-defense, entrapment, accident, or the defense of being not guilty.

Fourth, Respondent argues that "the reasonable doubt standard, as applied to the duress defense, would overprotect defendants while jeopardizing important interests in punishing those who violate the law." Resp. Br. 23. The vast majority of circuits and States that have addressed the issue and placed the burden to prove the absence of duress on the prosecution beyond a reasonable doubt plainly disagree with the Respondent's contention. Nor has Congress stepped in to

address a rash of acquittals occasioned by the successful deployment of the duress defense.

In further support of its claim that the reasonable doubt standard overprotects defendants, Respondent maintains that "courts may allow the issue of duress to go to the jury even when the evidence on duress is extremely thin." Resp. Br. 24. Respondent, however, has no basis for such a concern. The defendant has the burden of producing evidence in support of each element of the defense of duress. As in any other case, the trial court will act as "gatekeeper" in determining whether the defense evidence is sufficient to go to the jury.[4] Thus, if the defendant has not met her burden, the judge will not give the jury an instruction on the duress defense. Shifting the burden of persuasion to the defendant does not aid Respondent because ultimately it is the judge who will decide whether there is enough evidence to go to the jury. That determination will not change based on which party bears the burden of persuasion. Therefore, the prospect of "extremely thin" evidence does not warrant placing the burden of persuasion on the defendant.

Respondent contends that the "one" practical consideration offered by Petitioner has been rejected by the Court. Resp. Br. 25-26 (citing *Martin* v. *Ohio*, 480 U.S. 228 (1987) and *Leland* v. *Oregon*, 343 U.S. 790 (1952)). Justice White's

---

[4] *United States* v. *Frazier*, 387 F.3d 1244, 1272 (11th Cir. 2004) *cert denied* 125 S.Ct. 2516 (2005) ("[T]he trial judge's role as gatekeeper is designed to ensure that the jury, in carrying out its prescribed role, bases its determinations on relevant and reliable evidence, rather than on speculation or otherwise unreliable conjecture. These bedrock principles establish that, while a criminal defendant must be given every meaningful opportunity to present a complete defense, in doing so he must comply with the procedural and evidentiary rules designed to facilitate a search for the truth."); *see also United States* v. *Talbott*, 78 F.3d 1183, 1188 (7th Cir. 1996) ("[I]t is entirely appropriate to let the judge serve as gatekeeper for affirmative defenses (for when there is no material dispute the judge may decline the defendant's request for an instruction")).

opinion in *Martin* only addressed the issue in a brief footnote responding to the dissent, 480 U.S. at 234 n.*. and Justice Clark's opinion in *Leland* only emphasized the jury's ability to separate guilt and innocence determinations from criminal responsibility and legal insanity. 343 U.S. 790 at 800. To the extent that either opinion can be read to reject the types of claims Petitioner has made here with respect to logical contradictions in the jury's instructions (Pet. Br. 47), those opinions have been called into question by subsequent decisions of this Court, see *Jackson* v. *Denno*, 378 U.S. 368 (1964) (finding juror confusion in separating issue of voluntariness of confession from guilt),[5] and certainly have not been followed by the circuit courts of appeals that analyzed the issue with care. E.g., *United States* v. *Mitchell*, 725 F.2d 832, 836 (2d Cir. 1983) (finding a "grave possibility of juror confusion" if defendant bears burden on duress defense by a preponderance of the evidence).

There exists another, more pernicious practical result that follows from burden-shifting. In any litigation, shifting the burden of proof inevitably invites the party without the burden to attack the credibility of the party bearing the burden as the simplest and easiest means of calling into question the evidence offered. Criminal defendants, however, are unlike any other witnesses with respect to credibility issues. That they are the subject of a charge by the United States of America strongly prejudices potential jurors, even before evidence is heard. Even cooperating witnesses who have already been charged are not similarly situated because they are sponsored by the prosecution. One of Respondent's own authorities amply illustrates a criminal defendant's peculiarly vulnerable position in this regard: "If the doctrine [of duress]

---

[5] In dissent, Justice Harlan compared the complexity of the issues in *Leland* and *Jackson* and found that issues in *Leland* were equally, if not more complex, than those in *Jackson*. *Jackson*, 378 U.S. at 432-37 (Harlan, J. dissenting). Thus, Justice Harlan found the ruling in *Jackson* to be a departure from the *Leland* ruling. *Id.*

was not to be the plaything of the shrewd and unscrupulous (*and were not those suspected of crimes already questionable in that respect?*) it had to be well-hedged and strict of proof." L. Newman & L. Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. Cal. L. Rev. 313, 314 (1957) (emphasis added). And, as Respondent further notes, "the sole evidence of duress [often] will be testimony offered by the defendant and close associates" thereby exacerbating credibility disparity. Resp. Br. 20. Nor does the presumption of innocence help in this regard because the obvious effect of shifting the burden of persuasion is to remove that presumption on this issue.

Petitioner's case is a good example. The prosecution's focus shifted to character assassination, not proof of guilt. Thus, in addition to proving the elements of duress, Petitioner had to prove her credibility. In final argument, the prosecutor stressed Petitioner's burden to prove by a preponderance of the evidence that she was under duress by convincing the jury that she was telling the truth. SF, pp. 792-796. The prosecutor spent all of her rebuttal time arguing that Petitioner was lying. She started by saying that "to allow Ms. Dixon to be excused from her criminal conduct by her claim of duress, first and foremost, you have to believe her." SF, p. 806. The prosecutor then reiterated how many times Petitioner lied on the ATF 4473 forms. The prosecutor continued her character attack by pointing out the completely unrelated admission by Petitioner that she misrepresented where she lived in order to enroll her children in school. The prosecutor concluded her rebuttal by telling the jury that they "had been fed a pack of lies." SF, p. 811. The prosecution never contended that Petitioner and her children were not abused by her ex-husband, Ted Dixon, nor by Thomas Earl Wright, Jr. Instead, the prosecution's strategy was to shift the burden to the Petitioner to prove her character, and thereby shift the burden to her to prove that she was not guilty.

More than just practical considerations support Petitioner's position. As a matter of fairness, similarly situated defendants should not be treated differently. The stark reality is that if Petitioner had acquired one of her abuser's guns and shot him with it, no burden would have shifted to her to demonstrate to the jury by a preponderance of evidence that she had acted in self-defense. Yet the defenses of self-defense and duress are not meaningfully different.[6] Self-defense, like duress, is often referred to as an affirmative defense.[7] A person is entitled to use force when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force.[8] The elements of duress are an immediate threat of death or serious bodily injury, a well-grounded fear that the

---

[6] *See United States* v. *Clavette*, 135 F.3d 1308 (9th Cir. 1998), where the defendant was charged with killing a grizzly bear and contended that he acted in self-defense. The opinion in that case reflects that the defendant was convicted based on the physical facts of the case, the inconsistent testimony of the defendant's wife who was a witness to the killing, and the testimony of the defendant himself. In that case, the government disproved self-defense beyond a reasonable doubt to the satisfaction of the jury. Certainly the grizzly bear was no help to the prosecution's case.

[7] *United States* v. *Branch*, 91 F.3d 699, 714 n.1 (5th Cir. 1996); *United States* v. *Alvarez*, 755 F.2d 830, 842 n.12 (11th Cir.) *cert. denied* 474 U.S. 905 (1985); *United States* v. *Corrigan*, 548 F.2d 879, 881 (10th Cir. 1977); *United States* v. *Talbott*, 78 F.3d 1183, 1186 (7th Cir. 1996); Model Penal Code § 1.12, Comment 3 (1962).

[8] A person acting in self-defense must use no more force than appears reasonably necessary under all of the circumstances. Force that is likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary in order to prevent death or great bodily harm. O'Malley, Grenig, & Lee, *Federal Jury Practice and Instructions, Criminal*, § 45.19 (2004); LaFave & Scott, *Substantive Criminal Law*, § 5.7 (1986); 2 Robinson, *Criminal Law Defenses*, Chapter 3 C (1984). One who is the aggressor is not entitled to an instruction on self-defense. *United States* v. *Wagner*, 834 F.2d 1474, 1486 (9th Cir. 1987).

threat will be carried out, and no reasonable opportunity to avoid the threatened harm.[9] Thus, the essence of duress and self-defense are the same, that is, an unlawful threat of imminent death or serious bodily injury which causes the actor to engage in conduct that, but for the imminent threat, would violate the criminal law. Proof that the conduct results from the imminent threat demonstrates that the defendant did not have the "evil mind" or "vicious will" that is necessary for criminal liability.

Although self-defense and duress are essentially the same, they are not treated the same. In all federal circuits, including the Fifth Circuit, judges instruct juries in self-defense cases that the prosecution must disprove self-defense beyond a reasonable doubt and a self-defense-negation is included as part of the elements of the offense. O'Malley, Grenig & Lee, *supra*; *United States* v. *Branch*, 91 F.3d 699, 714 n.1 (5th Cir. 1996). As Petitioner engaged in the less blameworthy conduct of purchasing firearms, and in her mind, keeping her children safe, rather than taking a life, she was required to prove her defense by a preponderance of the evidence. Such discrepancies were criticized by the drafters of the Model Penal Code. The Comments to the Model Penal Code explain that "as to all these claims for exoneration their truth goes in final analysis to the guilt,- to the rightness of punishing the accused. Thus, it seems inconsistent to demand as to some

---

[9] *United States* v. *Toney*, 27 F.3d 1245, 1248 (7th Cir. 1994); *United States* v. *Santos*, 932 F.2d 244, 249 (3d Cir. 1991); *United States* v. *Hernandez-Franco*, 189 F.3d 1151, 1157 n.3 (9th Cir. 1999); *United States* v. *Scott*, 901 F.2d 871, 873 (10th Cir. 1990) In the Fifth Circuit Pattern Jury Instructions the defense is entitled "Justification, Duress, or Coercion," and adds two additional requirements: that the defendant had not recklessly or negligently placed himself in a situation where it was probable he would be forced to choose the criminal conduct, and that a reasonable person would believe that by committing the criminal act he would directly avoid the threatened harm. § 1.36 Fifth Circuit Pattern Jury Instructions, Criminal (2001). This was the source of the jury instructions in Petitioner's case.

elements of guilt, such as an act of killing, that the jury be convinced beyond a reasonable doubt, and as to others, such as duress . . . the jury may convict though they have such doubt." Model Penal Code, § 1.12, Comment 5 (Final Draft 1962), quoting C. McCormick, *Handbook of the Law of Evidence* § 321, at 684 (1964).

The entrapment defense also bears a striking resemblance to duress. To make out an entrapment defense, the defendant must come forth with evidence that demonstrates that the police officers "implant[ed] in the mind of an innocent person the disposition to commit the alleged offense." *Sorrells* v. *United States*, 287 U.S. 435, 442 (1932). In other words, the defendant must prove that law enforcement induced commission of the crime. Like duress, the issue in the entrapment defense is the blameworthiness of the defendant. Both defenses contend that the actor's will was overborne. Yet, it is beyond dispute that in entrapment cases the prosecution must disprove entrapment by proving, beyond a reasonable doubt, that the defendant was "predisposed" to commit the crime before being approached by law enforcement officials. *Mathews* v. *United States*, 485 U.S. 58, 67 (1988). Certainly, claims of predisposition, involving as they do the defendant's history and mental state, are no less onerous to investigate and prove than a claim that another person coerced the defendant. Given that the underlying nature of the two defenses is the same, there is no justifiable reason to treat the defenses differently for purposes of the burden of persuasion.

II. THE COMMON LAW SUPPORTS PLACING THE BURDEN OF PERSUASION ON THE PROSECUTION

Respondent's arguments respecting the status of the "common law" of duress and other affirmative defenses are, first and foremost, a semantic slight-of-hand. Respondent repeatedly refers to the early common law (or the law at the time the Constitution was enacted) as the "common law." As

Petitioner acknowledged in her brief, Pet. Br. 17-20, early common law defendants often bore the burden of proof, but the common law took a decidedly different track – with respect to duress and other affirmative defenses – in the wake of the Court's seminal opinion in *Davis* v. *United States*, 160 U.S. 469 (1895), over a century ago. Respondent, however, repeatedly uses the phrase "common law" to denote the "early common law" to argue for example, that "the fact that the common law placed the burden of proving the affirmative defense of duress on the defendant soundly dispels any notion that such practice offends any fundamental principle of justice." Resp. Br. 45. The common law cannot be so limited in its definition[10] and, in any event, that is a poor effort to distract the Court from a century of important common law doctrine that should govern this case.

Petitioner's opening brief cites the innumerable cases in both federal and state courts[11] that have established a strong majority common law rule the requires prosecutors to disprove a properly raised duress defense. Pet. Br. 24-34. Respondent's substantive argument in response attacks the continued validity of *Davis* following the Insanity Defense Reform Act of 1984[12] and asserts that the Court should disregard all of the cases that "merely followed Davis"

---

[10] "It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk* v. *United States*, 290 U.S. 371, 383 (1933); *see also Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 533 n.28 ("The common law, of course, is an evolving body of law.").

[11] Respondent's reaction to Petitioner's demonstration that the vast majority of states (29 in number) do not shift the burden of duress while only 14 do, amounts to saying little more that "14 out of 50 ain't bad." Resp. Br. 38 n.30. Petitioner likes those numbers too.

[12] Pub. L. No. 98-473, Tit. II, Ch. IV, 98 stat. 2057 ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence."), codified at 18 U.S.C. § 17(b).

because they are of "questionable value." Resp. Br. 34. That Congress permitted a shift of the burden of proof in insanity cases, however, only reinforces Petitioner's position. As Respondent points out, Congress legislates against a backdrop of common law. Resp. Br. 29. That Congress took steps with respect to the insanity defense did not in any way effect or abrogate the validity of other case law declaring that a burden-shift in a duress case would be improper. If the Act tells us anything at all, it shows Congress saw no need to act with respect to the common law of affirmative defenses as a whole. In reality, the Insanity Defense Reform Act of 1984 is a red-herring: The common law principle that a prosecutor must prove to a jury that a properly presented duress defense does not raise a reasonable doubt remains wholly intact.

Moreover, Respondent cannot seriously maintain that the core holding in *Davis* has been overruled. *Davis* rejected the early common law practice that allocated burdens of proof in criminal cases in the same fashion as civil ones. "The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence." *Davis*, 160 U.S. at 485. The premise of this core holding was no less a principle than the *evidentiary* power of the presumption of innocence. *Coffin* v. *United States*, 156 U.S. 432, 460 (1895) ("[P]resumption of innocence is evidence in favor of the accused."). This fundamental distinction between civil and criminal matters led to the trend of courts placing the burden of persuasion on the prosecution. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 917-18 (1968). Further, the legislative history of the Insanity Defense Reform Act of 1984 offers no support for an implied claim that Congress rejected this fundamental distinction. Instead, as Respondent concedes, the Act was a direct reaction to the acquittal of John Hinckley for the attempted murder of President Ronald Reagan. See Resp. Br. 27 n.18. Therefore,

Congress' action "cannot bear the weight [Respondent] places upon it."[13]

Relying upon *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922), Respondent also asserts that "where Congress expressly creates an affirmative defense to criminal conduct, it is well-established that the defendant bears the burden of establishing that defense." Resp. Br. 28. Respondent would like for this Court to be left with the impression that *McKelvey* supports its position that defendants bear the burden of persuasion on Congressionally created affirmative defenses. *McKelvey* says no such thing. To begin with, *McKelvey* concerns the legal sufficiency of the indictment, not the burden of proof at trial. 260 U.S. at 356-57. Further, *McKelvey* relies entirely on civil cases and nowhere acknowledges *Davis*. Respondent's claim that *McKelvey* supports its position is therefore misplaced.

Respondent maintains that the reasoning of *Davis* does not aid the Petitioner because, unlike insanity, "duress does not call into question any presumption relied upon by the government." Resp. Br. 30. Respondent is mistaken. Respondent's own source confirms that a background assumption of our criminal justice system is that people act of

---

[13] Respondent also makes much of the fact that Congress once considered a bill to codify the duress defense. Resp. Br. 27 n.19. Remarkably, that bill did not place the burden of persuasion on the defendant despite a recommendation to that effect by the National Commission on Reform of Federal Criminal Laws. *Id.* Indeed, the revised version of the bill left it up to the courts to decide the defense "according to the principles of the common law as they may be interpreted in the light of reason and experience." *Id.* (internal quotation omitted). In any event, this Court's previous rulings make clear that little weight should be given to an unenacted bill. *Puerto Rico Dep't. of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws."); *see also Brecht* v. *Abrahamson*, 507 U.S. 619, 632 (1993) ("As a general matter, we are reluctant to draw inferences from Congress' failure to act." (internal quotation omitted)).

their own free will.[14] Without this assumption, it would be impossible to hold individuals criminally responsible for their actions. The duress defense directly challenges this presumption.[15] Indeed, "[t]he excusing condition in duress is the impairment of the actor's ability to control his conduct." 2 Paul H. Robinson, *Criminal Law Defenses* 351 (1984).

III. DUE PROCESS CONCERNS REQUIRE THE BURDEN OF PERSUASION TO BE PLACED ON THE PROSECUTION

Respondent's brief wholly ignores the holdings in the very line of cases that are the source of due process concerns in this case. In *Morissette* v. *United States*,[16] *Liparota* v. *United States*,[17] and *Staples* v. *United States*,[18] the Court held that the *mens rea* component of crime encompasses concepts of "freedom of the will" and "freedom of choice." Because "affirmative defenses" like duress and self-defense contend that the actions of another and the circumstances at hand deprived the defendant of any reasonable choice other than unlawful action, they traverse this element. The Court's decisions holding that no due process violation under *In re Winship*, 397 U.S. 358 (1970) occurs where defendants are required to prove a defense by a preponderance of evidence turn on the proposition that the defenses in those cases did not

---

[14] *See* Newman, *Duress, Free Will And the Criminal Law*, 30 S. Cal. L. Rev. 313, 313 (1957) ("Legal responsibility, be it civil or criminal, implies freedom.").

[15] *See* Newman, 30 S. Cal. L. Rev. at 313 ("[T]he law has reasoned that where it can be shown that a man acted under a compulsion which deprived him of his 'free will,' such an individual would not be held responsible for his act. This, in essence, is the thinking that lies behind the formulation of the criminal duress doctrine.").

[16] 342 U.S. 246 (1952).

[17] 471 U.S. 419 (1985).

[18] 511 U.S. 600 (1994).

traverse an element of the crime charged. *Martin* v. *Ohio*, 480 U.S. at 231 (appellant did not dispute the existence of the three elements to aggravated murder); *Patterson* v. *New York*, 432 U.S. at 205-06 (evidence supporting affirmative defense of extreme emotional duress mitigated murder to manslaughter). Thus, to the extent that a duress defense *does* traverse the *mens rea* element of the charged crime in that it challenges the defendant's ability to act of his or her own volition, the decisions in *Martin* and *Patterson* are in irreconcilable tension with *Morissette*, *Staples* and *Liparota*.

Respondent attempts to reconcile this tension in two ways. First, Respondent argues that "freedom of choice . . . is not a component of mens rea" (Resp. Br. 13), an assertion that cannot survive *Morissette* and its progeny.[19] Second, Respondent contends that duress and similar defenses address only a defendant's motive and not his or her intent. Resp. Br. 33-34. To be sure, the oft-repeated claim that a distinction exists between motive and intent such that a defendant's motive may have no bearing on the *mens rea* element of the crime may hold true in some contexts where the compulsion was not at issue. For example, whether a defendant in an aggravated assault case acted out of simple animus or for pecuniary gain does not bear on the question of whether the defendant's actions were voluntary. In either case, they plainly were and it is inconceivable that a defense based upon such motives would be a defense at all. But the fact that this

---

[19] Respondent cites *Powell* v. *Texas*, 392 U.S. 514, 535 (1968), for its assertion that "this Court has never articulated a general constitutional doctrine of mens rea." Resp. Br. 42. *Powell* is wholly inapposite as it involved an Eighth Amendment challenge to a public drunkenness charge where the defense was that the defendant's drunkenness was a product of his disease. Whatever a "general constitutional doctrine of 'mens rea'" may mean, certainly the Court's more recent opinions in *Staples and Liparota*, relying on *Morissette*, have held that it includes "the ability and duty of the normal individual to choose between good and evil." *Staples*, 511 U.S. at 605; *Liparota*, 471 at 425-26 (same).

distinction between motive and *mens rea* holds in these extreme examples offers no instruction in this case and has been rejected by this Court previously in other contexts. *Apprendi* v. *New Jersey*, 530 U.S. 466, 493 (2000) (rejecting a claim that the defendant's "purpose" only went to motive and did not identify an element of the aggravated crime). Recent commentators have also observed that purported distinctions between motive and criminal intent serve only as a means to define away criminal defenses.[20]

In reality, the presence or absence of what Respondent refers to as a "motive" often bears directly upon *mens rea* considerations.[21] The absence of a financial interest, for example, is often used to show that an otherwise law abiding defendant had no intent to violate the law.[22] Indeed, evidence

---

[20] *See* Guyora Binder, *The Rhetoric of Motive and Intent*, 6 Buff. Crim. L. Rev. 1, 65-66 (2002) ("[M]otive cannot be shown to be irrelevant to criminal liability, except by defining motives as intentions irrelevant to criminal liability."); *see also* Eric J. Grannis, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Colum. L. Rev. 178, 189-90, January 1993 ("[I]f one evening A breaks into B's house, it is important to know *why* he did so, as it is burglary only if he did so for the purpose of committing a felony. This illustration demonstrates that what is technically a 'motive' in one context...can be a matter of 'intent' in another.") (emphasis in original).

[21] *See also* Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *1A Fed. Jury Prac. & Instr.* § 17.06 (5th ed.) (explaining that motive evidence may aid in ascertaining a defendant's state of mind or intent); Charles Alan Wright and Kenneth W. Graham, Jr., *22 Fed. Prac. & Proc. Evid.* § 5240 (evidence of motive may be offered to prove requisite mental state).

[22] *E.g.*, *United States* v. *Jones*, 587 F.2d 802, 806-07 (5th Cir. 1979) (lack of motive to defraud Medicare defense); *United States* v. *Huckaby*, 698 F.2d 915, 920-21 (8th Cir. 1982) *cert. denied* 460 U.S. 1070 (1983) (affirming admittance of evidence rebutting defendant's claimed lack of monetary benefit); *see also Martin* v. *United States*, 606 A.2d 120, 127-29 (D.C. 1991) ("Evidence of a lack of motive is quintessentially exculpatory."); *United States* v. *Franklin*, 704 F.2d 1183, 1187-88 (10th

of "motive" is adduced by both prosecutors and defendants in criminal cases and is admissible (and not excluded by trial courts as irrelevant) precisely because it bears upon the "state of mind of the defendant accompanying the act" – the very definition of "intent." Black's Law Dictionary, 810 (6th ed. 1990); *United States v. Turner*, 441 F.2d 1161 (4th Cir. 1971) (where defendant was charged with making a false statement in connection with the acquisition of a firearm, the district court properly allowed testimony that the defendant shot someone "to come in only to show that the [defendant] had the requisite criminal intent at the time he made the false statement"). Accordingly, Respondent cannot resolve the due process tensions in this case by defining compulsion as merely a "motive" that is irrelevant to requisite intent necessary to commit the crime.

Given the state of the common law of the duress defense, there can be but little concern that a holding by this Court that due process principles preclude allocating the burden of persuasion to defendants for such defenses will fundamentally alter the landscape of criminal prosecutions. In contrast, a holding that due process permits such burden shifting would only serve to invite the very same "labeling" concerns – that certain defenses are "affirmative" ones or that defense evidence addresses "motive" and not "intent" - that engendered this Court's ruling in *Apprendi*, 530 U.S. at 494. The effect of a duress defense is to traverse the prosecution's claim that the defendant meant to undertake the unlawful act and due process therefore requires that the burden must remain on the prosecution to convince the jury that this defense does not rise to the level of reasonable doubt.

Cir. 1983) (rejecting argument that defendant's motive was irrelevant given that intent was element of charged hate crime offense).

CONCLUSION

For the foregoing reasons, the Court should reverse the Fifth Circuit's ruling.

Respectfully submitted,

Jeffery T. Green
Katrice L. Bridges
Cytheria D. Jernigan
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202)736-8000

J.Craig Jett*
1601 Elm Street
Suite 2000
Dallas, Texas 75201
(241) 871-7676

Counsel for Petitioner

April 18, 2006

*Counsel of Record